

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE)
SUBSTANTIAL DEVELOPMENT PERMIT)
GRANTED BY PIERCE COUNTY TO DAY)
ISLAND MARINA,)
DAY ISLAND COMMUNITY CLUB,)
Appellant,)
v.)
PIERCE COUNTY and DAY ISLAND)
MARINA,)
Respondents.)

SHB No. 87-12

FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW AND
ORDER

THIS MATTER, the appeal of a shorelines substantial development permit granted by Pierce County to Day Island Marina, came on for hearing before the Shorelines Hearings Board, Lawrence J. Faulk, Judith A. Bendor, Nancy Burnett, Dennis J. McLerran and Steven Morrison, Members, convened at Lacey, Washington on November 11, 1987, and at Tacoma, Washington on November 12, 1987.

Administrative Appeals Judge, William A. Harrison, presided.

1 Appellant appeared by Roger M. Leed, Attorney at Law. Respondent
2 Day Island Marina appeared by William T. Lynn, Attorney at Law.
3 Respondent Pierce County appeared by Steven R. Shelton, Deputy
4 Prosecuting Attorney. Reporter Cheri L. Davidson recorded the
5 proceedings.

6 Witnesses were sworn and testified. Exhibits were examined. The
7 Board and Administrative Appeals Judge viewed the site in the company
8 of the parties. Post hearing briefs were filed. From testimony heard
9 and exhibits examined the, Shorelines Hearings Board makes these

10 FINDINGS OF FACT

11 I

12 This case arises in Pierce County on the waterway separating Day
13 Island from the mainland.

14 II

15 Residential use on Day Island has coexisted with industrial or
16 commercial use on the mainland continuously since 1915. In that year
17 the Clear Fir Lumber Company constructed a saw mill on the mainland at
18 the present site of respondent, Day Island Marina. The lumber mill
19 operated until partially destroyed by fire in 1934. The Northwest
20 Door Company operated the remaining mill buildings until a second fire
21 about 1942. Thereafter the site was occupied for some time by the
22 Puget Die Cast Company. Respondent Day Island Marina acquired the site
23 in 1958 and expanded to its present size by 1965. In 1972 Lindal
24

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1 Homes located an industrial facility south of the present Day Island
2 Marina. Lindal filled the shoreline with material which included
3 sawdust. When this ceased, the fill was capped, and in 1976 Day
4 Island Marina aquired the site from Lindal. Lindal's former
5 industrial building is now used by Day Island Marina for boat storage.

6 III

7 A concrete highway bridge now crosses the southern end of the
8 waterway. Historically, a large timber bridge was built across the
9 northern end of the waterway in about 1915. This has since been
10 razed.

11 IV

12 Day Island waterway is approximately 18 acres in size at high
13 tide. It presently contains three separate marinas: Respondent, Day
14 Island Marina (approximately 128 boat moorages) on the mainland shore,
15 Day Island Yacht Club (approximately 141 boat moorages) on the
16 mainland shore and Day Island Yacht Harbor (approximately 57 boat
17 moorages) on the Day Island shore. Nearly all of the moorages are
18 covered. Dredged channels allow ingress and egress from each marina.

19 V

20 In 1984 respondent Day Island Marina (hereafter D.I. Marina)
21 proposed to expand its moorage southward onto the former Lindal site.
22 It proposed an additional 95 covered moorages together with additional
23 upland area for boat maintenance. The expansion site lies between
24 respondent's existing marina and the nearby Day Island Yacht Club. A
25

1 marina basin 10 feet deep at low tide would also be created by
2 dredging.

3 VI

4 The 95- moorage proposal was published in a draft environmental
5 impact statement (EIS) dated May 7, 1984. In response to comments
6 received and further studies, the proposal was reduced to 86 covered
7 moorages. Other features of the proposed development include dredging
8 for the basin and widening of the entrance channel. This would
9 require removal of some 96,000 cubic yards of dredge spoil. Of this,
10 79,000 cubic yards would be disposed of at the Department of Natural
11 Resource's marine disposal site off-shore of Steilacoom and 17,000
12 cubic yards would be disposed of at an upland site. Also, a 350-foot
13 bulkhead is proposed to protect the upland portion of the site. The
14 area upland of the bulkhead would be paved for use as a dry land boat
15 maintenance area. Storm drains with oil-water separators are proposed
16 for this area. The D.I. Marina's existing, paved parking area would
17 be re-striped to accomodate more cars in the same area. A pump out
18 station for the holding tanks of boat toilets is proposed for the
19 expansion. There is presently no pump out station at the existing
20 marinas nor elsewhere in Day Island waterway. Conventional restroom
21 facilities would also be provided.

22 VII

23 As mitigation for habitat loss due to dredging, D.I. Marina
24 proposes planting a salt water marsh adjacent to its intended
25

1 expansion, and also to change the surface texture of nearby intertidal
2 mudflats.

3 VIII

4 A typical covered moorage would be 32 feet long. These are
5 intended to accomodate larger pleasure craft. The present demand for
6 covered moorage exceeds supply. Population increases forecast for the
7 Tacoma area are expected to increase demand above present levels.

8 IX

9 Public access to the proposed expansion would be by a pier
10 proposed near the south end of the proposed bulkhead. Along the south
11 property line the dredge slopes have been configured with
12 consideration for Pierce County's desire not to preclude the future
13 installation of a public boat ramp in a marine street end. That ramp
14 is not part of this proposal.

15 X

16 The proposed development was described, as set forth above,
17 together with alternatives and corresponding impacts in a Supplemental
18 EIS dated February 26, 1985, and a Final EIS dated June 7, 1985.

19 XI

20 The Pierce County Shoreline Master Program (PCSMP) designates the
21 site in question as "urban". Within the urban environment the PCSMP
22 provides that:

23 Marinas are allowed subject to the general
24 regulatory standards and obtaining a substantial
25 development permit. PCSMP Sec. 65.50.030(A), p.50-1

XII

The intent of Pierce County with regard to marinas is expressed in the following:

INTENT. It is the intent of Pierce County to encourage the construction of sizeable marinas in areas of adequate flushing action so as to secure economies of scale for the benefit of users and so as to minimize the number of shoreline areas which must be commercialized. Because good marina design involves many variables, construction shall require a Substantial Development Permit granted upon a finding by the appropriate County reviewing authority of consistency with the guidelines of Section 65.50.040. Building Permits are also required. PCSMP Sec. 65.50.020, p. 50-1. (Emphasis added)

XIII

There are 25 marina guidelines set forth at Section 65.50.040 of the PCSMP which is the section cited in the "Intent" language above. Those cited as pertinent to this matter are:

1. Important navigational routes for marine oriented recreation areas will not be obstructed or impaired;

2. Views from surrounding properties will not be unduly impaired;

* * * *

4. Public use of the surface waters below ordinary high water will not be unduly impaired;

5. The intensity of the use or uses of any proposed marina shall be compatible with the surrounding environment and land and water uses;

1 6. In areas identified by the Department of
2 Fisheries, Game or Natural Resources in accordance
3 with a study in existence at the time of
4 application as having a high environmental value
5 for shellfish, fishlife or wildlife, a marina shall
6 not be allowed unless it can be conclusively
7 established that the marina will not be detrimental
8 to the natural habitat.

9 7. The proposed site must have the flushing
10 capacity required to maintain water quality.
11 Application for a marina shall be approved in a
12 constricted body of salt water (width at the
13 entrance less than half the distance from the
14 entrance to the innermost shoreline) only if there
15 is one surface acre of water within the constricted
16 body, measured at mean low water, for each boat
17 moorage (including buoys) within said constricted
18 body.

19 8. Parking areas associated with marinas must be
20 set back from the water and screened with the dual
21 objective of making the area as visually
22 unobjectionable as possible and that they are not
23 located on the upland immediately adjacent to the
24 water. Sufficient spaces must be provided for the
25 parking load normal to a non-holiday summer weekend.

26 * * * *

27 23. Covered moorages are not permitted in areas
determined by the appropriate reviewing authority
to be [of] scenic value "sic".

24 24. Where covered moorages are utilized, a dock
25 shall be provided to the public for viewing the
26 water and for fishing when feasible and
27 appropriate."

XIV

The reduced, 86-moorage proposal was submitted to Pierce County in an application for a shoreline substantial development permit. This was in early 1985. On July 29, 1985, following hearing, the Pierce County Hearing Examiner approved the application. Following an appeal to the Pierce County Council the matter was remanded twice for further hearings before the Hearing Examiner. The application was again approved by the Hearing Examiner subject to 31 conditions (Designated (A) through (C)(C) of the Hearing Examiner's decision of July 29, 1985, and (A) through (C) of the Hearing Examiner's decision of December 31, 1986). The Pierce County Council accepted the foregoing approval by resolution dated February 24, 1987. Appellant, Day Island Community Club, filed its request for review before this Board on March 21, 1987.

XV

The factual disputes in this appeal concern: 1) water quality, 2) wetland habitat, 3) benthic habitat, 4) view and aesthetics and 5) navigation and related uses. The adequacy of the EIS is also at issue on each of these subjects as well as the adequacy of alternatives to the proposal considered by the EIS. We make the following findings with regard to these issues.

Water Quality. Appellant urges that the Day Island waterway does not have adequate tidal flushing and that this in combination with releases of raw sewage from boat toilets would degrade the already degraded quality of water in the waterway. We disagree.

Flushing. Respondent, D.I. Marina, has performed analytical calculations to quantify tidal flushing in the Day Island waterway both before and after the proposed development. The tidal prism method was employed. This is the standard method for measuring tidal flushing in water bodies. There is presently no scientific concensus for the proposition advanced by appellant that disparate flushing may occur as between the water column on the one hand and the surface micro-layer and bottom layer of water on the other hand. Nor is there a current scientifically agreed method to test for the existance of this disparate flushing. We find that there is adequate flushing or tidal exchange presently in the Day Island waterway; namely, that between 50% and 85% of the water in the water-way is flushed during a single tidal cycle. We find that there will be no substantial change in flushing if the marina is constructed, that there would be no dead water pockets, and that flushing in Day Island waterway would remain adequate to maintain water quality.

1 Bacteria. Appellant contends 1) that there are excessive bacteria
2 levels in Day Island waterway at present and 2) the additional boats
3 attracted by the proposal would substantially worsen that problem by
4 direct sewage discharge to the water. We find to the contrary on each
5 point.

6 As to present bacteria levels, sampling conducted by appellant has
7 yielded results which are not persuasive. This sampling was conducted
8 by the "skim" method whereby the sample is collected by skimming the
9 surface. This method is inappropriate for determining levels of fecal
10 coliform as presented by appellant. The proper procedure involves the
11 "dip" method and the difference between the two methods renders
12 appellant's skim samples unreliable for comparison to the fecal
13 coliform criteria adopted by Department of Ecology (DOE), WAC
14 173-20-045, cited by appellant. In addition, the criteria within that
15 regulation has itself grown suspect with the passage of time. The
16 fecal coliform criteria of DOE was adopted following the publication
17 of information by the U.S. Environmental Protection Agency (EPA) in
18 1973. More than a decade later, in 1986, EPA has published the
19 following information:

20 EPA concluded from these studies that the
21 indicator organism group recommended in "Quality
22 Criteria for Water; the fecal coliforms, is
23 inadequate. The EPA studies demonstrated that the
24 enterococci have a far better correlation with
25 swimming associated gastro-intestinal illness in
26 both marine and fresh waters than fecal coliform;

1 and that E.coli, a specific bacterial species
2 included in the fecal coliform group has a
3 correlation with gastro-intestinal illness in fresh
4 waters equal to the enterococci, but does not
5 correlate in marine waters." Federal Register,
6 Vol. 51, No. 45, Friday March 7, 1986, Notices
7 (emphasis added).

8 The new criteria recommended by EPA for marina waters is:

9 Enterococci - not to exceed 35/100 ml. Id. P.8013.

10 This applies to areas designated for swimming. Enterococci sampling
11 shows readings within the enterococci standard in Day Island waterway
12 except in the immediate vicinity of the outfall of Crystal Creek and
13 the 27th Street outfall both on the mainland shore. These enterococci
14 levels dissipate rapidly to a level of 10 to 12/100 ml. on the Day
15 Island Shore where swimming is enjoyed by Day Island residents and
16 guests.

17 As to the contention that boats are or would be a source of direct
18 sewage discharge, sampling by appellant does not show the supposed
19 correlation between boat usage and total fecal coliform. Moreover,
20 speciation tests show that the only identifiable source of bacterial
21 contamination in Day Island waterway are the Crystal Creek and 27th
22 Street outfalls which carry drainage from the greater mainland.

23 Appellant has not shown either that bacteria levels pose a problem
24 for Day Island waterway at the present time nor that additional boats
25 brought in by the proposal would constitute a significant source of
26 bacteria. We find that the marina is unlikely to have a significant
27 effect upon water quality in the Day Island waterway.

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XVII

Wetland Habitat. The site presently contains a bed of salicornia (pickle weed) which serves as wetland habitat for waterfowl, wildlife and general detrital production. However, the site also contains wood waste fill. This accounts for salicornia density which is moderate to poor and plants which are straggly with poor growth. The proposal calls for dredging which would remove both the salicornia bed and the wood waste fill. As mitigation, D.I. Marina proposes to establish a salicornia bed of 10,000 square feet on clean fill. This would be larger than the existing 6,500 square foot salicornia bed that would be lost to dredging. This mitigation was designed in close consultation with agencies having special expertise in such matters and is likely to compensate fully for loss of the existing salicornia habitat. The D.I. Marina has proposed monitoring and contingency plans (Final EIS, Appendix P) to assure that this compensation will occur. The proposal has not been shown to pose any reduction in the size or value of the salicornia wetland habitat.

XVIII

Benthic Habitat. The mudflats of Day Island waterway support bottom dwelling (benthic) organisms which provide food for juvenile salmon and other fish species. At the site of the proposal, however, this habitat is now adversely affected by sediment from the outfall of Crystal Creek, and by extensive wood waste debris placed there in

1 times pre-dating environmental concerns.

2 Dredging from the proposed marina expansion would eliminate 2.8
3 acres of intertidal, mudflat habitat. As mitigation, D.I. Marina
4 proposes to improve benthic productivity on 1.7 acres of intertidal
5 mudflat to the west and south of the site. This would be done by
6 placing a layer of coarse rock (2-3 inches) over the entire mudflat to
7 be enhanced. A layer of sandy loam material (4 inches) would then be
8 placed over the rock. Finally, a layer of rocks (4-12 inches) would be
9 scattered over the sandy layer. The effect of these actions would be
10 to create an improved benthic habitat in the 1.7 acre enhancement
11 area. While this would not replace lost habitat on an area for area
12 basis, it will probably replace or exceed the lost habitat on a value
13 for value basis. The D.I. Marina has proposed monitoring and
14 contingency plans (Final EIS, Appendix P) to assure that this
15 compensation will occur. Thus, the mitigation can be expected to
16 provide total numbers of organisms equal to or greater than the
17 organisms on the project site under existing conditions.

18 XIX

19 View and Aesthetics. The Day Island waterway is a densely
20 developed urban area, and has been so for many years. The site in
21 question lies against a backdrop of upland, industrial buildings. A
22 great portion of the uplands are paved in the vicinity of the site.
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1 Crystal Creek discharges its often silt-laden waters onto the site
2 from a culvert protruding out from under the pavement. The existing
3 condition of the site does not render it particularly scenic. The
4 proposed covered moorages would provide a difference in the view but
5 would not materially harm the view from Day Island. No blockage of
6 view from the adjacent (industrial) uplands is involved here.

7 The D.I. Marina proposes to turn the outermost boat moorages so
8 that their doors open landward. This, and other measures, will
9 minimize the light emitted in the direction of residences on Day
10 Island.

11 The proposal would not materially harm views or have any
12 substantial adverse aesthetic effect.

13 XX

14 Navigation and Related Uses. Navigation at low tide in the Day
15 Island waterway is primarily confined to the dredged channels serving
16 the existing three marinas. At high tide the proposed site could be
17 navigated, and the proposal would eliminate that area from general
18 boating or fishing use. A considerable area would remain in the Day
19 Island waterway, however, for general boating and fishing at high
20 tide. Boating and fishing in the areas near Day Island waterfront
21 residences would not be impaired. The proposal is unlikely to have
22 any substantial adverse effect on navigation and related uses.

XXI

Environmental Impact Statement. Appellants contend that the water quality analysis contained in the EIS is flawed by not disclosing serious existing water quality problems and the prospect of substantial harm from the discharge of raw sewage from boats. We have previously found that neither the existence of serious bacterial pollution nor the prospect of substantial harm from boat discharges has been shown. The EIS was therefore not remiss in this regard. The same is true as to the contention that the EIS did not disclose other adverse impacts which impacts were not proven likely. These include appellant's concern for micro-layer flushing (See Finding of Fact XIV, above), benthic and wetland habitat (See Finding of Fact XV and XVI, above) view and navigation (See Finding of Fact XVII and XVIII, above). Lastly, appellants allege that the EIS does not develop appropriate alternatives or discuss the relationship between these and the proposal. Appellant has not shown that any reasonable alternative was excluded from the EIS nor that the comparisons between the proposal and alternatives were deficient.

XXII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

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CONCLUSIONS OF LAW

I

Appellant, having requested review, bears the burden of proof in this proceeding. RCW 90.58.140(7).

II

We review the proposed development for consistency with the Shoreline Management Act and the applicable (Pierce County) master program. RCW 90.58.140(2)(b).

III

Shoreline Management Act. A marina is a priority use specifically contemplated by the Shoreline Management Act (SMA):

Alterations of the natural condition of the Shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences, ports, shoreline recreational uses including but not limited to parks, marinas, piers and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of people to enjoy the shorelines of the state. RCW 90.58.020 (emphasis added).

In this instance the marina expansion is not proposed for location on truly natural shorelines as the shoreline at issue has already been substantially altered both at and near the site of the proposal. Yet this does not diminish the propriety of the proposal, rather it

enhances that propriety as set forth in Eickhoff v. Thurston County,
17 Wn. App. 774, 565 P.2nd 1196 (1977):

The approval of the expansion of the marina, taking into consideration that the result of approval would have less adverse impact on nature than the creation of an additional totally new marina, was a proper action. Eickhoff, at p.783.

Thus the proposed marina expansion in an area already substantially given over to marina use is, as a choice of use and location, consistent with the SMA.

IV

Pierce County Shoreline Master Program: Marinas. The Pierce County Shoreline Master Program (PCSMP) provides that marinas are a permitted use in the urban environment, subject to general regulatory standards. PCSMP Section 65.50.030(A.), p.50-1. (Full text at Finding of Fact XI, above.) The term "general regulations" appears elsewhere in the PCSMP under specific uses such as dredging and landfill and under the various environmental designations such as urban. That term does not appear in the chapter dealing with marinas. The appellant has not proven any inconsistency between the proposal and general regulatory standards. The proposed marina expansion, in this urban environment, is consistent with PCSMP Section 65.50.030 which establishes marinas as a permitted use.

Pierce County Shoreline Master Program: Guidelines for Marinas.

As noted above, the term "general regulations" does not appear within the PCSMP Chapter 65.50 dealing with marinas. Rather, that Chapter employs "Guidelines" for marinas. This is the result of deliberative planning by Pierce County which we had occasions to review in Department of Ecology, et.al. v. Pierce County and Murphy, SHB No. 84-28 (1984). In Murphy we reviewed similar guidelines employed by the PCSMP for piers and docks. We cited in Murphy our earlier case of Kooley and Pierce County v. Department of Ecology, SHB No. 218 (1976). In Kooley we upheld Department of Ecology's denial of a variance. We held the variance to be necessary for the proposed dock at issue because it would have been longer than 50 feet. At that time, 1976, the PCSMP provided that:

1. Maximum length shall be fifty (50) feet or only so long as to obtain a depth of eight (8) feet, whichever is less at mean lowest, low water. PCSMP, 1976 Version at p.99.

Within one year after Kooley, Pierce County amended its master program to delete the above language and substituted "Guidelines" for piers and docks. The amended language stated that:

"In lieu of specific standards relating to design, location, bulk and use, the following guidelines shall be applied by the County's reviewing authority to a site specific project

1 application for Substantial Development Permit in
2 arriving at a satisfactory degree of consistency
3 with the policies and criteria set forth in this
Chapter." PCSMP Section 65.56.040, Piers and Docks
(emphasis added).

4 The identical language appears in the marina chapter of the PCSMP now
5 at issue. PCSMP Section 65.50.040. Both the Piers and Docks chapter
6 and the Marina chapter were amended in a single resolution of the
7 Pierce County Council (Amended Res. #19803, June 14, 1977). The
8 explanation within the Resolution #19803 relating to the establishment
9 of "Guidelines" states:

10 This preamble to the general regulations has
11 been added by the Citizens Committee. This, in
12 effect, makes the following provisions flexible
13 guidelines to be considered on a case by case basis
rather than rigid regulations. (Emphasis added).

14 We conclude here, as in Murphy, that the PCSMP Guidelines are
15 permissive rather than mandatory. We further conclude, however, as in
16 Murphy, that special circumstances must exist which render compliance
17 with the Guideline impractical and that non-compliance must not result
18 in any significant adverse impact.

VI

Consistency of the Proposal with the Marina Guidelines. Guideline No. 7 for marinas contains a one acre - one moorage formula. (See Finding of Fact XI, above, for text). Applying the holding reached above and in Murphy, we conclude that: 1) There are special circumstances which render compliance with the guideline impractical in that the one acre - one moorage formula was exceeded in Day Island waterway prior to enactment of the SMA or PCSMP and 2) appellant has not proven that excedence of that formula here would result in inadequate flushing or an adverse effect upon water quality or any other significant adverse impact. The one acre - one moorage formula is therefore not a bar to this proposal.¹ This application of the guideline no. 7 is consistent with Pierce County's expressed intent that such guidelines be flexible and that the guidelines "...encourage the construction of sizeable marinas in areas of adequate flushing action..." PCSMP Section 65.50.020, p.50-1, full text at Finding of Fact X, above.

¹ This formula employs the word "shall" whereas the similar guideline in Murphy employed the word "should". This is a distinction without a difference in that the word "shall" need not always be construed as mandatory. While such a construction is the general rule, the general rule is subject to exception where a contrary legislative intent is indicated. Northwest Natural Gas v. Clark County, 98 Wn. 2d 739, 658 P.2d 669 (1983), State v. Huntzinger 92 Wn. 2d 128, 594 P.2d 917 (1979), and Liquor Control Board v. Personnel Board, 88 Wn. 2d 368, 561 P.2d 195 (1977). We have found a legislative intent expressed within the PCSMP that marine guidelines be flexible, and therefore construe the word "shall" to be permissive rather than mandatory in this context.

1 We conclude that the proposed development as conditioned by Pierce
2 County is consistent with the marina guidelines of PCSMP Section
3 65.50.040, p.50-2.

4 VII

5 Pierce County Shoreline Master Program Policies. The PCSMP is
6 divided into two volumes the first (blue) volume containing policies
7 and the second (white) volume containing use regulations. The
8 relation between the two is stated at p.21 of the blue volume:

9 Use Activity policies are a means of guiding
10 types, locations, designs and densities of the
11 future shoreline developments. These general
12 policies are implemented by the use regulations
13 which are included in Phase II of the Master
14 Program.

15 The marina guidelines are within the second (white volume) dealing
16 with use regulations. We conclude that the consistency of this
17 proposal with the marina guidelines also evidences consistency with
18 the PCSMP policies of the first (blue) volume which the guidelines
19 implement.

20 VIII

21 Adequacy of the Environmental Impact Statement. The standard for
22 EIS adequacy is whether the environmental effects and reasonable
23 alternatives of a project are sufficiently disclosed, discussed and
24 substantiated. Barrie v. Kitsap County, 93 Wn. 2d 843, 854, 613 P.2d
25 1148 (1980). Adequacy of an EIS is judged by a rule of reason. Id.

1 Applying the rule of reason to the draft, supplementary and final EIS
2 we conclude that these sufficiently disclose, discuss and substantiate
3 the impacts of the proposal and reasonable alternatives. We conclude
4 that the EIS in this matter is adequate.

5 IX

6 In summary, the proposed marina expansion is consistent with the
7 Pierce County Shoreline Master Program and the Shoreline Management
8 Act. The environmental impact statement is adequate. The shoreline
9 substantial development permit granted by Pierce County should be
10 affirmed.

11 X

12 Any Finding of Fact hereinafter determined to be a Conclusion of
13 Law is hereby adopted as such.

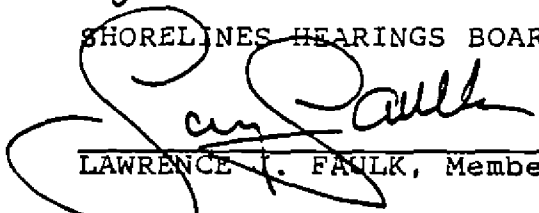
14 From these Conclusions, the Board makes this
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ORDER

The shoreline substantial development permit granted by Pierce County to Day Island Marina is affirmed.

DONE at Lacey, WA this 29th day of June, 1988.

SHORELINES HEARINGS BOARD


LAWRENCE J. FAULK, Member

(See Separate Opinion)

JUDITH A. BENDOR, Member


NANCY BURNETT, Member

(See Separate Opinion)

DENNIS J. McLERRAN, Member


STEVEN W. MORRISON, Member


WILLIAM A. HARRISON
Administrative Appeals Judge

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FINAL FINDINGS OF FACT
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(23)

1 Bendor and McLerran
2 Separate Opinion, Concurring In Part:

3 We concur in the result reached by our three colleagues, but rest
4 our decision, in part, on different grounds. We also provide
5 additional facts where we concur, but find the companion opinion
6 somewhat sparse.^{1/} Where the two opinions differ and conflict,
7 neither opinion is entitled to legal precedential effect, as neither
8 has garnered the necessary four-member Shoreline Hearings Board
9 majority. See WEC et al., v. Douglas County, et al., SHB Nos. 86-34,
10 86-36, and 86-39 (January 12, 1988), at fn. 2.

11 FINDINGS OF FACT

12 IV

13 The Day Island waterway is an embayment, and Class AA waters under
14 the State of Washington water quality standards. WAC 173-201-080. At
15 low tide, a large proportion of this embayment is exposed mudflats,
16 with navigation almost exclusively confined to dredged channels.
17 Within the waterway there are currently three separate marinas,
18 including Day Island Marina which has approximately 128 in-water boat
19 moorages with additional upland dryland boat storage.

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23 ^{1/} For the sake of convenience, this opinion will follow the other
24 opinion's numbering.

25
26 FINDINGS OF FACT AND
27 CONCLUSIONS OF LAW
(Bendor/McLerran)

VI

The proposed expansion of the Day Island Marina will require dredging to provide a basin 10 feet deep at low tide. No dredging or other in-water construction will occur between March 15 through June 15 without the prior approval of the Department of Fisheries.

A 350-foot bulkhead will be built to protect the upland portion of the site. The area upland of the bulkhead will be paved for use as a boat maintenance area, but no painting of boats will be allowed in that area. The Marina's existing, paved parking area will be re-striped to accommodate more cars in the same area.

A six-foot deep vegetative buffer will be planted and maintained between the parking area and the bulkhead. (Condition 2(1)) Landscaping six-feet in width will be provided along property lines. A storm drainage system meeting Pierce County Public Works' requirements, with oil-water separators, will be constructed and maintained. An in-water speed limit of 7 mph will be established and enforced. For mitigation, a 10,000 a square foot salicornia (salt water marsh plant) area will be established, and monitored and maintained for five years. Improved habitat for juvenile salmon will be created.

A sewage pump-out station for boat wastes will be installed, with prior Department of Ecology design approval. Signs will be posted to warn moorage users that it is unlawful to discharge sanitary wastes or

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
(Bendor/McLerran)

1 any pollutants into the waters. The Marina operator will enforce the
2 prohibition of pollutant discharge, including terminating leases. The
3 operator will provide clear instructions on operating the pump-out
4 system, and provide such education as necessary. A restroom will be
5 provided near the moorage, to be accessible whenever the Marina is
6 open. This will facilitate disposal of sewage wastes from "Porta
7 Potties", and will otherwise promote the "no pollutant" discharge
8 prohibition. The operator will provide and maintain litter and
9 garbage receptacles at several convenient locations. No
10 "live-aboards" will be allowed in the Marina. Swimming will be
11 prohibited. The Marina operator will establish and enforce a code of
12 acceptable behavior for Marina tenants, to cover boat speed,
13 littering, and "other potential problems".

14 VII

15 The salicornia area will provide necessary organic material for
16 the intertidal area and the waterway, as well as habitat for
17 gregarious waterfowl such as mallards and widgeons. The waterway is
18 currently used by a limited number of waterfowl. Those bird species
19 which are more sensitive to human activities, such as herons, after
20 the expansion will likely not continue to use the area. All the
21 resource agencies which have commented on this permit have concluded
22 that the habitat mitigation is adequate.

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25
26 FINDINGS OF FACT AND
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Water Quality.

One of appellant's key contentions is that the Day Island waterway has inadequate flushing, and that the expansion will lead to significant adverse water quality impacts. We find that appellant, who has the burden of proof, has not demonstrated such facts.

The water quality of the embayment is generally good as measured by temperature and dissolved oxygen; tests showed the waters met Class AA water quality standards. Chapt. 173-201 WAC. Appellant has not proven that after the project there will be a lack of water mixing or dead pockets of water within the waterway, or that temperature or dissolved oxygen levels will be adversely affected.

Appellant's main water quality focus has been on fecal coliform levels. Fecal coliform is an indicator of pollution. State standard for Class AA marine waters require that:

Fecal coliform organisms shall not exceed a geometric mean value of 14 organisms/ [per] 100 Ml., with not more than 10 percent of samples exceeding 43 organisms/100 Ml. WAC 173-201-045(1)(1)(c)(B).

The waterway currently is not an area where shellfish are harvested. There is some limited wading in the water during the summer, but there is no evidence that full-body immersion or extended swimming is done. No swimming will be allowed in the Marina.

We find, based on respondent Marina's own evidence (Exhs. R-24 and

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1 R-40), that there is an ambient water quality fecal coliform problem
2 in the waterway. The primary sources of this coliform are stormwater
3 drains which empty into the embayment. Ambient state water quality
4 standards are exceeded. (It was, in part, due to water quality
5 concerns that the permit was remanded twice for further hearings
6 before the Pierce County Hearing Examiner.) However, in the record
7 before us, neither the local health department nor the State
8 Department of Ecology is opposed to the project as finally issued by
9 Pierce County with conditions. Moreover, for the reasons further
10 outlined below, we find that appellant has not proven that the
11 expansion of the Marina will cause significant adverse water quality
12 impacts.

13 The fecal coliform exceedances are due in substantial measure to
14 the storm water drains' polluted waters, and appellant has not proven
15 that these exceedances will be affected one way or the other by the
16 expansion. We find that appellant's evidence on the alleged
17 correlation between boating activity levels and elevated fecal
18 coliform is not probative. During water quality sampling in 1987, the
19 appellant used the "skim" method, which is not the proper protocol for
20 taking ambient samples. Appellant's 1986 data seemed to show the
21 converse of appellant's thesis, i.e., that when the most boats were
22 out of the Marina on trips fecal coliform levels were higher. The
23 evidence presented does not lead to a finding that fecal coliform
24 levels are strongly related to Marina users.

25
26 FINDINGS OF FACT AND
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1 We find that the tidal flushing is adequate. Respondent Marina
2 performed calculations using the tidal prism method to quantify
3 flushing in the waterway before and after the proposed expansion.
4 This methodology is accepted in the scientific community. The
5 calculations revealed that before the project, from 50% to 85% of the
6 water is exchanged during a tidal cycle, and with the marina expansion
7 there would be a slight decrease in flushing of 4%-5%. Appellant
8 contends that the surface microlayer and bottom waters do not flush at
9 the same rate. The evidence presented by appellant in this case did
10 not so demonstrate.^{2/}

11 In sum, we find that appellant has not demonstrated that the
12 expanded marina, as conditioned by Pierce County, will adversely
13 impact the existing water quality of the Day Island waterway. In so
14 doing, we rely on the state water quality standards, the approach
15 advanced by appellant who has the burden of proof. The extant,
16 enforceable water quality bacteriological standards for marine waters
17 in Washington State applicable to this permit are the fecal coliform
18 ones. (Finding of Fact XVI) We, therefore, need not and do not
19 address respondent Marina's proffered (EPA-proposed) enterococci
20 bacteriological ones.

23 2/ Moreover, surface microlayer research is in the developmental
24 stage.

1 We find the other opinion's apparent reliance on enterococci
2 bacteriological levels (taken during one day's sampling) and its'
3 silence on the ambient fecal coliform situation to be insupportable.
4 In so stating, we take judicial notice that DOE reviews the water
5 quality standards tri-annually, and on February 4, 1988 after public
6 process revised the standards. The State consciously chose not to
7 change the bacteriological standards, retaining the previous fecal
8 coliform ones, while fully aware of the 1986 EPA-recommended
9 enterococci proposal. The State's reasons for doing so are clear; the
10 EPA-proposed criterion have "limited applicability for Washington's
11 multi-use marine waters." (Exh. A-20; Washington DOE Issue Paper on
12 Bacteria Criteria, December 1986).

13 Regardless, the other opinion's foray on this issue is devoid of
14 legal precedential effect. WEC, supra.

15 •
16 XIX

16 We find the existing site to not be uniquely scenic. The proposed
17 marina expansion will not unduly harm views or aesthetics.

18 XX

19 Due to the expansion and attendant increase in boat traffic there
20 will be some minor reduction of area in which general boats can
21 navigate at high tide. We nonetheless find that the project overall
22 is unlikely to impair or have a substantial adverse impact on
23 navigation, on public use of the surface waters, or on public ingress
24 or egress to the waters.

25
26 FINDINGS OF FACT AND
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1 We have previously found that appellant has not proven that the
2 project will cause significant adverse water quality impacts. While
3 the EIS for the project did not raise the fecal coliform issue, that
4 does not render the EIS inadequate. An EIS need only analyze the
5 environmental impacts of a proposal that are significant. WAC
6 197-11-402(1). Lead agencies are directed to scope their EISS to
7 analyze only the probable significant adverse impacts of a proposal.
8 WAC 197-11-408(1) Since there is no proven significant adverse
9 impact, we find the Environmental Impact Statement to be adequate.

10 Any Conclusion of Law which is deemed a Finding of Fact is hereby
11 adopted as such.

12 From these Finding we come to these

13 CONCLUSIONS OF LAW

14 V and VI

15 Pierce County Shoreline Master Program: Guidelines for Marinas.

16 The Intent section of the SMP Marina Chapter states that:

17 65.50.020 INTENT. It is the intent of Pierce County to
18 encourage the construction of sizeable marinas in areas
19 of adequate flushing action so as to secure economies of
20 scale for the benefit of users and so as to minimize the
21 number of shoreline areas which must be commercialized.
22 Because good marina design involves many variables,
23 construction shall require a Substantial Development
24 Permit granted upon a finding by the appropriate County
25 reviewing authority of consistency with the guidelines
26 of Section 65.50.040. Building Permits are also
27 required. (Added Res. #19803, June 14, 1977)

23 The Pierce County SMP Marina Guidelines, within the SMP Marina

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Chapter, are in lieu of specific design, location, bulk and use standards, and are to be applied to site specific project applications to arrive "at a satisfactory degree of consistency with the policies and criteria in this chapter." (Marinas Chapter 65.50.040)

The Guidelines are geared in large measure to assure that water quality will not be adversely impacted, and to discourage the construction of marinas in areas which are not already commercialized. The Day Island Marina is an urbanized commercialized area.

Taking into consideration all the language of the SMP Marina Chapter and the Guidelines, and reading the text in its entirety, we conclude that the numerical criteria of: one surface acre of water at mean low water for each boat moorage, is not a specific, absolute numerical cut-off, where, as in this instance, an area is already highly committed to such moorage, already exceeds the numerical ratio, and appellant has not proven that the project will adversely impact the water quality, public recreation, or navigation. In sum, we conclude that the SMP Marina Chapter and Guidelines were properly applied.

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1 Any Finding of Fact herein determined to be a Conclusion of Law 1'
2 hereby adopted as such.

3 The Shoreline substantial development permit is AFFIRMED.

4 DONE this 29th day of June, 1988.

6 SHORELINES HEARINGS BOARD

7
8 
JUDITH A. BENDOR, Member

9
10 
DENNIS J. McLERRAN, Member

11
12 (See Separate Opinion)
LAWRENCE J. FAULK, Member

13
14 (See Separate Opinion)
NANCY BURNETT, Member

15
16 (See Separate Opinion)
STEVEN W. MORRISON, Member

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24 FINDINGS OF FACT AND
25 CONCLUSIONS OF LAW
(Bendor/McLerran)

26 SHB NO. 87-12

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